

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from Court of Appeals
Fitzgerald, P.J., Holbrook, Jr., and Cavanagh, JJ.

ROBERT F. DESHAMBO,

Plaintiff-Appellee,

DOCKET NO. 122939-40

and,

Court of Appeals Nos. 233853
consolidated with 223854

JENNIFER M. GRANDHOLM, Attorney General
of the State of Michigan, and MICHIGAN
DEPARTMENT OF COMMUNITY HEALTH

Lower Court No. 00-5127-NO

Intervening Plaintiff-Appellee,

v.

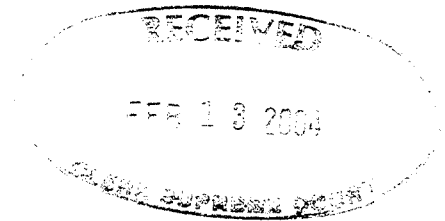
NORMAN R. NIELSEN and PAULINE NIELSEN,

Defendants-Appellants,

and

CHARLES W. ANDERSON,

Defendant



APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Submitted by:

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STATEMENT OF QUESTIONS INVOLVED

- I. HAS THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE BEEN INAPPROPRIATELY EXTENDED BEYOND ITS ORIGINAL APPLICATION TO EMPLOYEES OF INDEPENDENT CONTRACTORS PERFORMING DANGEROUS WORK?

APPELLANT ANSWERS “YES”

APPELLEE ANSWERS “NO”

THE TRIAL COURT AND THE COURT OF APPEALS DID NOT ADDRESS THIS ISSUE

- II. DOES PUBLIC POLICY REQUIRE THAT INJURED EMPLOYEES OF AN INDEPENDENT CONTRACTOR NOT COVERED BY WORKER’S COMPENSATION BE PERMITTED TO RECOVER UNDER THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE?

APPELLANT PRESUMABLY ANSWERS “NO”

APPELLEE ANSWERS “YES”

THE TRIAL COURT OR COURT OF APPEALS DID NOT ADDRESS THIS ISSUE.

- III. DID THE PLAINTIFF SUBMIT SUFFICIENT EVIDENCE TO ESTABLISH THAT THERE WAS A MATERIAL ISSUE OF FACT AS TO THE NIELSEN’S KNOWLEDGE OF THE RISKS AND DANGERS INHERENT IN TIMBER CUTTING?

APPELLANT ANSWERS “NO”

APPELLEE ANSWERS “YES”

THE CIRCUIT COURT ANSWERED “NO”

THE COURT OF APPEALS ANSWERED “YES”

- IV. DID THE CIRCUIT COURT IMPROPERLY HOLD THAT THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE CAN ONLY BE APPLIED TO UNUSUAL ACTIVITIES AND HAS NO APPLICATION WHERE THE PLAINTIFF’S INJURY COULD HAVE BEEN AVOIDED BY WELL RECOGNIZED SAFETY MEASURES?

APPELLANT ANSWERS “NO”

APPELLEE ANSWERS “YES”

THE CIRCUIT COURT ANSWERED “NO”

THE COURT OF APPEALS ANSWERED “YES”

- V. WHETHER ANY DECISION THAT THE IMHERENTLY DANGEROUS ACTIVITY NO LONGER APPLIES TO EMPLOYEES OF INDEPENDENT CONTRACTORS SHOULD BE GIVEN ONLY PROSPECTIVE EFFECT.

APPELLANT PRESUMABLY ANSWERS “NO”

APPELLEE ANSWERE “YES”

THE TRIAL COURT AND COURT OF APPEALS DID NOT ADDRESS THIS ISSUE.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

The Plaintiff's claim arises out of a logging accident which occurred on March 1, 1997 when he was permanently paralyzed below the chest by a tree that was felled on him by Defendant Charles W. Anderson ("Anderson"). At the time he was injured, the Plaintiff was logging with Defendant Anderson on the property of Defendants Nielsen.

The Nielsen's own a 130-acre farm in Leelanau County near Northport. (Appellant's Appendix L pp.153a, 154a). Approximately 30 acres of the property is planted with 1500-2000 cherry trees. (Appellant's Appendix K p. 153a). Another 6-8 acres is planted with corn, and the remainder of the property is a wood lot. (Appellant's Appendix L pp. 20, 23). The Nielsens have resided on the property since Mr. Nielsen retired from General Motors in 1987. (Appellant's Appendix L p. 154a.). However, since 1992, the Nielsens have wintered in Arizona. (Appellant's Appendix L pp 153a,158a, 160a). The cherry farming operation is managed by a neighbor, Mr. Deering, with the Nielsens making the marketing decisions.

Prior to the accident in which the Plaintiff was injured, the Nielsens had conducted two earlier timber harvesting operations on their property. (Appellant's Appendix L 156a). The first was conducted through a forester in the 1970's. (Appellant's Appendix L 157a). The most recent was done by International Hardwoods in 1994. (Appellant's Appendix L 156a).

According to Defendant Norman R. Nielsen, the cherry farming operation pays for the taxes and insurance, although he acknowledges that at times he has made money from the cherry farming operation. (Appellant's Appendix L pp 155a, 158a). Mr. Nielsen testified that the primary purpose

for the timber harvests was for money. (Appellant's Appendix L p. 157a)

According to Mr. Nielsen, he originally asked Anderson to clean up the tops that had been left from the earlier harvest and suggested that he also cut the poplar that was left by the lumber company. (Appellant's Appendix L p. 158a). Under the arrangement proposed by Mr. Nielsen, Anderson was to keep the tops for firewood, but was to pay him a fair price for the poplar. (Appellant's Appendix L p. 158a, 160a). Mr. Nielsen acknowledged that while he was unfamiliar with timber cutting safety procedures and had never discussed these matters with Anderson, he realized that timber cutting was a kind of risky thing. (Appellant's Appendix L p. 161a).

Anderson testified that he had previously logged and harvested cherries for the Nielsens in the past. (Appellant's Appendix K p. 126a). At the time of the accident, the Plaintiff was working for Anderson as a casual laborer and Anderson did not carry workers compensation insurance. (Appellant's Appendix K p. 123a).

The Plaintiff testified that on the day of the accident he went to the work site on the Nielsen property with Anderson and Harry Gleason. Upon arrival at the site, Anderson instructed the Plaintiff and Gleason to begin splitting wood that had been previously cut and stacked at the site. (Appellant's Appendix J P. 98). While he was splitting wood Anderson instructed him to begin felling a stand of poplar trees. (Appellant's Appendix J p. 98). After dropping the trees, the Plaintiff began to delimb them, when he heard "yelling and screeching" as the Plaintiff turned, he saw a tree falling towards him. In a panic he tried to escape, but was struck on the shoulder by a section of the falling tree. A second section struck a log pile, flipping one of the logs, which struck the Plaintiff in the back and pinned him between the log and the falling tree. (Appellant's Appendix J pp. 98, 99)

The Plaintiff alleged in his complaint that the Nielsens were liable for the negligence of

Anderson on the grounds that logging was an inherently dangerous activity. Subsequently, the Nielsen's moved for Summary Disposition asserting that there was no material issue of fact as to their knowledge of the dangers involved in tree removal and that logging was not an inherently dangerous activity.

In response to the Defendant's Motion for Summary Disposition, the Plaintiff submitted an Offer of Proof containing a U.S. Department of Labor, Bureau of Labor Statistics study showing that logging statistically ranked as either the first or second most dangerous occupation in the United States. According to this report, the single most significant factor in logging accidents is contact with trees. (Appellee's Appendix A p. 2). With respect to trees, the report states:

"Trees pose a number of hazards to loggers. Wind, structural irregularities in the tree, wet or sloped terrain, and structural failures within the tress such as heart rot, splits, breaks and cracks may cause the tree to fall at unexpected times in unexpected directions. Felled trees can become entangled in other trees or, less obviously and more commonly, broken tree limbs can be caught in nearby trees where they dangle capriciously, often falling onto unsuspecting loggers. The latter scenario is so common that hanging limbs are often referred to as "widow makers." Falling trees can also hit overhead power lines and telephone poles, or vines and other dense vegetation, resulting in erratic falls, fires or entanglement. "Fish-tailing" trees sweep a large surface as they swing sideways, and "mousetraps" sometimes occur when a felled tree strikes another, perhaps concealed log, which in turn strikes the logger. Even when the tree is settled it poses dangers when limbs become locked or bent. Loggers who cut these limbs must guard against slingshot effects, which can throw large limbs up to 50 feet..

Some 65 percent of logging fatalities occurred as a result of being struck by falling objects, almost all of which were trees and logs."

In addition to the offer of proof submitted by the Plaintiff the Nielsen's contractor, Charles Anderson testified logging is a dangerous activity and that safety is one of his primary concerns; and that the principal danger is being in the vicinity of a falling tree. (Appellant's Appendix K pp. 125a, 138a, 142a). Following the hearing held on January 8, 2001 the Circuit Court ruled that there was

no material issue of fact as to the Nielsens' lack of knowledge about the risks and dangers inherent in timber cutting and how those risks should be addressed. (Appellant's Appendix I p 88a). The circuit court also held that logging was not an unusual activity that posed unique or special risks that would qualify it as an inherently dangerous activity; and that liability should not be imposed where reasonable safeguards could have been readily provided by a responsible contractor. (Appellant's Appendix I p. 83a).

The Plaintiff subsequently filed a Claim of Appeal of the Circuit Court's decision on with the Court of Appeals. On October 22, 2002, the Court of Appeals issued an unpublished opinion reversing the decision of the Circuit Court granting the Defendant's Nielsen's Motion for Summary Disposition. (Appellant's Appendix F pp 25a, 26a, 27a). The Court of Appeals found that the facts in the present case were distinguishable from those found in Justus v. Swope, 184 Mich App 91; 57 NW2d 103 (1990), where the court declined to apply the inherently dangerous activity doctrine to a "mere homeowner" who hired a tree removal service to cut down a single tree near a building because a homeowner could not have anticipated the risks involved in that particular procedure. (Appellant's Appendix F p. 27a).

However, in the present case the court noted that the Defendant had conducted two prior logging operations for profit, and agreed that logging was a risky thing. Viewing these facts in the light most favorable to the plaintiff a material question of fact existed as to the Defendant's knowledge of the risks involved in logging at the time of the contract. The court also found that although some cases discussed whether an activity had to be unusual in order to impose liability in none of those cases was that a dispositive factor. (Appellant's Appendix F p. 27a).

Following this decision the Defendant's filed a motion in the Court of Appeals for rehearing

which was denied on December 2, 2002. (Appellant's Appendix G). On November 6, 2003 this court granted the Defendant's application for leave to appeal.

ARGUMENT

I.

THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE HAS NOT BEEN INAPPROPRIATELY EXTENDED BEYOND ITS ORIGINAL APPLICATION TO THIRD PARTY EMPLOYEES OF INDEPENDANT CONTRACTORS PERFORMING DANGEROUS WORK

It is generally held that a landowner or employer of an independent contractor is not liable for injuries and damages resulting from the negligent acts of the contractor or his employees. *Misiulis v. Milbrand Maintenance Co.*, 52 Mich App 494; 218 NW2d 68 (1974). As with most general rules there are exceptions, with respect to the independent contractor rule there are three recognized exceptions: 1) retained control, 2) inherently dangerous activity, and 3) common work areas. *McDnough v. General Motors Corp*, 388 Mich 340; 201 NW2d 609 (1972), *Bozak v. Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985). *Warren v. McClouth Steel Corp.*, 111 Mich App 496, 314 NW2d 666 (1981). In the instant case the Plaintiff seeks to recover from the Defendant's pursuant to the "inherently dangerous activity" doctrine. At the time he was injured the Plaintiff was working for the Defendant contractor Anderson as a casual laborer cutting pulp.

The inherently dangerous activity doctrine was initially recognized in Michigan in *Ingilis v. Millersberg Driving School Association*, 169 Mich 311; 136 NW 443 (1912). In *Ingilis*, supra, the plaintiff sought recovery for damage to his land caused by a fire set by an independent contractor on the defendant's property. The trial court entered a directed verdict for the Defendant on the grounds that the Defendant was not liable for the negligence of his independent contractor. The plaintiff appealed and this court reversed, holding that a landowner could not shield himself from liability by employment of an independent contractor, where the nature of the work necessarily exposed others to danger stating:

“If I employ a contractor to do a job of work for me which, in the progress of its execution obviously exposes others to unusual perils, I ought, I think, to be responsible, *** for I cause acts to be done which naturally expose other to injury.” 2 Cooley on Torts (3d Ed). P. 1091. This exception was recognized in a recent case by this court (*Rogers v. Parker*, 169 Mich., at pages 282 and 283 [123 N.W. 1111, 34 L.R.A. (N.S.) 995, 18 Am. & Eng. Ann Cas. 753]), where the following quotation taken from an eminent author is quoted: “So it is the duty of every person who does in person, or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken, and he cannot escape this duty by turning the whole performance over to a contractor, etc. Mechem on Agency, & 747, and cases cited.” In 26 Cyc. pp. 1559, 1560, this rule is recognized, and the cases there cited amply sustain it:

“Where the work is danger of itself, or as often termed, ‘inherently’ or ‘intrinsically’ dangerous, unless proper precautions are taken, liability cannot be evaded by employment of an independent contractor to do the work. Stated in another way, where injuries to third persons must be expected to arise, unless means are adopted by which such consequences may be prevented, the contractee is bound to see to the doing of that which is necessary to prevent the mischief.

In *Ingilis*, supra, the court referred to the application of the rule to “others” or “third persons,” suggesting that the doctrine is limited to innocent third parties who are not themselves engaged in the activity. Nevertheless, in Michigan courts have extended the term “others” or “third parties” to include employees of independent contractors in certain situations. *McDonough v. General Motors Corp.*, supra. *Vannoy v. City of Warren*, 15 Mich App 158; 166 NW2d 486 (1968). *Bozak v. Hutchinson*, supra.

The first in Michigan case to directly address the issue as to whether the inherently dangerous activity doctrine extended to employees of an independent contractor’s is *Vannoy v. City of Warren*, supra.

In Vannoy, supra, the Plaintiff's decedent an employee of an independent contractor was overcome by gas and drowned while working in the Plaintiff's sewer. The Plaintiff alleged that the city was vicariously liable for the negligence of its independent contractor if the decedent was engaged in an inherently dangerous activity. The city argued that the inherently dangerous activity exception was only applicable to third parties, and not to employees of an independent contractor. The trial court rejected this argument and instructed the jury on the Plaintiff's theory of an inherently dangerous activity, the jury subsequently returned a verdict for the Plaintiff, and the Defendant appealed.

On appeal the court rejected the Defendant's argument that the inherently dangerous activity doctrine was not applicable to the contractor's employees. Noting that the doctrine was similar to, but not exactly the same as strict liability it imposed on the employer of the independent contractor a non-delegable duty to make such provisions against negligence as is commensurate with the obvious danger; and that a distinction based upon the legal designation of the injured parties such as "third persons" or "others" as opposed to the employees of an independent contractor, would violate the absolute character of the duty.

The Appellant suggests that the courts in Vannoy, supra, McDonough, supra, and Bozak, supra, have inappropriately extended the inherently dangerous activity doctrine by merging it with other distinct exceptions to the independent contractor rule. However, as evident from Vannoy, supra, the underlying rationale for extending the doctrine to the employees of independent contractors is based on the non-delegable nature of the duty, rather than confusion with other residual theories of liability.

The rationale for not extending the inherently dangerous activity doctrine to the employees

of an independent contractor is premised on privity of contract and assumption of risk theories. This view was articulated by Justice Brennan in his dissent in McDonough, supra, wherein he stated:

The rule is not designed, nor was it ever intended to benefit the contractor who undertakes the dangerous work, or his employees.

Thus, if I employ a contractor to remove a stump from my yard by use by use of explosives, I am liable to my neighbor whose garage is damaged by the concussion. This is because it is I who have set the project in motion; it is I who have created the unusual peril; it is for my benefit that the explosives were used. As between myself and my neighbor, I ought not to be permitted to plead that it was the contractor's negligence and not my own which damaged his property.

But, if the contractor should blow up his own truck, I should not be liable. He is the expert in explosives and not me. I had neither the legal right nor the capability to supervise his work. The same would be true if the contractor's workman had injured himself, or been injured by the carelessness of a fellow workman or the negligence of his employer. Neither the contractor nor his employees are "others", as contemplated in Cooley's statement of the rule. Indeed, they are privy to the contract which creates the peril.

According to the quotation above the contractor and his employees have more expertise in the activity than the person who hires them, therefore, they assume risk of injury when they enter into the contract. However this rationale would not apply to third person's standing outside of the contract. Therefore the application of the inherently dangerous activity doctrine is limited to those innocent third parties outside of the contract.

While this logic is persuasive with respect to the contractor it is not necessarily so with respect to the employee. Muscat v. Khalil, 150 Mich App 11; 388 NW2d 267 (1986). In Muscat v. Khalil, supra, the court affirmed the trial courts grant of summary disposition against an independent contractor who tried to avail himself of the inherently dangerous activity doctrine against a home owner. In upholding the trial courts decision the court noted a significant distinction between the

independent contractor and his employees stating:

We note from each of the passages quoted above that the independent contractor himself is not mentioned as a party intended to benefit from the inherently dangerous activity doctrine. Rather, the passages refer to “third parties” or, more generally, “others”, and employees of the contractor. We do not believe that these references were inadvertent since none of the cases cited by the plaintiff involves a recovery by the independent contractor himself for damages sustained as a result of his own negligence in performing the work of the employer. We believe that an important distinction exists between employees of an independent contractor and the independent contractor himself. **Since an employee has no control over the manner in which the work is to be performed and must simply carry out the orders and directions of his employer, he stands in a position more closely akin to the innocent bystander, or “third party”.** The independent contractor himself, on the other hand, was hired specifically for his ability to perform the work properly and is given complete control over the manner in which the job is to be completed. **Thus, where harm occurs as a result of the failure to take “special” precautions in work” ‘necessarily involving danger to others, unless great care is used’**”, *Bosak*, supra, p 727, quoting *Inglis v. Millersberg Driving Ass’n*, supra, p 331, employees and third parties, not having authority to ensure that the necessary care is used, are rightfully excepted from the general rule which immunizes the employer of the independent contractor from liability. However, the independent contractor himself in most instances is in a better position to determine when and where “great care” and “special precautions” are warranted and is empowered with the authority to ensure that such care is exercised. [n.omitted]. Therefore, without considering whether the activity involved herein was in fact “inherently dangerous”, we conclude that the position advanced by plaintiff would result in an unwarranted extension of the “inherently dangerous activity” exception to the immunity afforded employers of independent contractors. [*Muscat*, 150 Mich App 119. (Emphasis added)].

Accordingly, the application of the inherently dangerous activity doctrine by Michigan’s courts to employees of independent contractors is not due to the prior courts misapprehension of the doctrine or factors unrelated to the nature of the work performed as suggested by the Appellant. Rather, it is the nondelagable nature of the duty, and the fact that the contractor is in a superior position to

control the performance of the work that extends the inherently dangerous activity doctrine to the employees of the independent contractor.

The Appellee submits that “inherently dangerous activity” doctrine has been applied by Michigan’s courts to employees of independent contractors for over thirty years. Vannoy v. City of Warren, supra, McDonough v General Motors Corp., supra, Bozak v. Hutchinson, supra. Since it is the settled law of this state, the doctrine of “stare decisis” requires that prior precedent be followed unless the court is convinced that the prior decision was not merely wrongly decided, but also less injury would result from over ruling the prior decision than following it. McEvoy v. Sault Ste. Marie, 136 Mich 172; 98 NW 1006 (1904).

This court has set forth a four part test to determine whether a prior decision should be overruled; 1) whether the earlier case was wrongly decided, 2) whether the decision defies practical workability, 3) whether reliance interests would work an undue hardship, and 4) whether changes in the law or facts no longer justify the questioned decision. Pohutski v. City of Allen Park, 465 Mich 675; 641 NW2d 219 (2002). Robinson v. Detroit, 462 Mich 439; 613 NW 2d 3007 (2000).

As already noted, the Appellant has not put forth any persuasive argument that the prior cases were wrongly decided, second while in some instances court’s have found the doctrine difficult to apply, it does not defy practical workability if properly understood; and the appellant has put forth no argument to show that is. Third, the Appellee submits that after thirty some years contractees, contractors, and employees have come to rely on the doctrine. Finally, the Appellant has not put forth any change in the law or facts that show the questioned decision is no longer justified. Accordingly, the Appellee submits that the prior case law should be affirmed.

II.

THAT PUBLIC POLICY REQUIRES THAT INJURED EMPLOYEES OF AN INDEPENDENT CONTRACTOR NOT COVERED BY WORKERS COMPENSATION BE PERMITTED TO RECOVER UNDER THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE.

If the court were to adopt the view expressed by Justice Brennon in his dissent in *McDonough v. General Motors Corp.*, supra, that the inherently dangerous activity doctrine is not applicable to employees of independent contractors, there are strong public policy reasons why it should not be applied to the facts in this case. In this instance the Plaintiff was not covered by workers compensation and does not qualify as statutory employee as defined in the Workers Compensation Act. MCL 418.115 (b). Workers Compensation is the exclusive remedy against the employer of an employee covered under the Workers Compensation Act. MCL 418.131 (1). However, an employer who is required to maintain worker's compensation, but fails to do so remains liable to the employee in a civil action. MCL 418.641 (2).

As noted by the Intervenor-Appellee, the decisions of those jurisdictions which do not apply to the inherently dangerous activity doctrine to the employees of an independent contractor are premised on the rationale that the exclusive remedy provisions of the Worker's Compensation Statutes act as a statutory release of liability against the contractor, therefore it would be anomalous to permit recovery against the property owner for the contractor's negligence, but not the contractor. *Privette v. Superior Court*, 5 Cal 4th 689; 854 Pzd 721 (1995). Under this theory the employee receives the benefit of statutorily bargained for compensation without regard to fault and in exchange the employer is released from tort liability, the cost of the worker's compensation premiums along with the release from tort liability are then passed on to the property owner in the contract. Therefore, vicarious liability cannot flow from the contractor to the property owner.

Privette v. Superior Court,

supra. Fleck v. Ang Coal Gassifications Co., 522 NW2d 445 (N.D. 1994). Zueck v. Oppenheimer Gateway Properties, 809 SW2d 284 (MO 1991).

The courts in these cases have also advanced additional reasons such as encouraging reliance upon skilled contractors to minimize the risk of injury to the public and employees engaged in inherently dangerous activities; and the avoidance of creating a special class of workers who can recover in both worker's compensation and tort. Privette v. Superior Court, supra, Fleck v. Ang Coal Gassification Co., supra, Zueck v. Oppenheimer Gateway Properties, supra.

However, if the plaintiff and other similarly situated workers were denied the benefit of the inherently dangerous activity doctrine the opposite would most likely be the result. The property owner or contractee would receive the benefit of a lower contract price while the independent contractor would assume all of the liability. Since the property owner or contractee would be insulated from liability this would encourage the hiring of a contractor at the lowest price who would in turn rely on the least skilled employees, thereby increasing the risk of injury both to the public and the employee. Finally, it would create a separate class of employees who can recover neither worker's compensation or in tort. On the other hand if the court were to hold that the inherently dangerous activity doctrine available to employees of independent contractors not covered by worker's compensation the result would be that the property owner or contractee would stand in the same shoes as the independent contractor while the employee would stand in the same position as other innocent third parties.

III.

THE PLAINTIFF SUBMITTED SUFFICIENT EVIDENCE TO ESTABLISH THAT THERE WAS A MATERIAL ISSUE OF FACT AS TO THE NIELSEN'S KNOWLEDGE OF THE RISKS AND DANGERS INHERENT IN TIMBER CUTTING.

The Appellants argued in their motion for summary disposition that there was insufficient evidence to establish that there was a material issue of fact as to their knowledge of the risks and danger involved in logging, and that the Court of Appeals erred in reversing the Circuit Court's decision granting the motion of summary disposition judgment.

At the hearing held on January 8, 2001, the Circuit Court ruled that the Appellant's motion for summary disposition should be granted on the grounds that there was no material question of fact as to whether the Defendants were knowledgeable about the risks and safety procedures involved in timber cutting, and that Michigan's case law holds that the inherently dangerous activity doctrine is only applicable where the employer of an independent contractor is capable of recognizing the risks inherent in the activity. *Justus v. Swope*, supra, *McDonough v. General Motors Corp.*, supra, *Bozak v. Hutchinson*, supra.

A motion for summary disposition pursuant to MCR 2.116(c)(10) tests whether there is factual support for a claim; in reviewing the motion, the court must consider all pleadings, affidavits, depositions, admissions and other documentary evidence available and giving all reasonable doubt to the non-moving party to determine whether a record could be developed which would leave open an issue upon which reasonable minds could differ. *Jesson v. General Telephone Co.*, 182 Mich App 430; 452 NW2d 836 (1990). Such a motion should not be granted unless it is shown that it is impossible to support the claim at trial because of some deficiency that cannot be overcome. *McCart v. J. Walter Thompson, USA, Inc.*, 181 Mich App 611; 450 NW 2d 10(1990). Where evidence is submitted concerning the hazardous elements of a job, the jury is to make the

determination of whether the job is an inherently dangerous. Burger v. Midland Cogeneration Venture, 202 Mich App 210; 507 NW2d 827 (1993).

With respect to dangerous elements of the job, the Plaintiff submitted an Offer of Proof in opposition to the Defendant's motion for summary disposition, U.S. Department of Labor, Bureau of Labor Statistics Report, "Logging is Perilous Work, dated 12/98, showing that logging has consistently ranked 1st or 2nd annually over the past decade as the most dangerous occupation in the United States. A worker's chance of being killed in a logging accident is 27 times greater than in any other occupation. Over 30 percent of all non-fatal logging accidents resulted in loss of work of over 30 days, and that the principal danger being struck by falling trees.

The Circuit Court in the present case relied on the decision in Justus v. Swope, supra, to conclude that the Appellants were not sophisticated landowners who would be knowledgeable as to the risks involved in timber cutting. The Appellee submits that the Appellant's and Circuit Courts reliance on Justus, supra, is misplaced. As stated in Sections 416 and 427, Restatement of Torts 2d, the inherently dangerous activity doctrine is applicable in two situations, which are as follows:

"416. One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions in the contract or other-wise.

"427. One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger."

As noted in Section 427, the doctrine does not require the employer of an independent contractor to have actual knowledge of the danger inherent in the activity, but only reason to know

or to contemplate the danger inherent in or normal to the work performed by the contractor.

In *Justus v. Swope*, supra, the Court of Appeals declined to extend the inherently dangerous activity doctrine to a homeowner who hired a tree removal service to remove a tree from his yard. Due to this proximity of a neighbor's shed, the tree had to be removed in sections by a method known as topping, involving the use of ropes and pulleys. The Plaintiff was injured when he failed to allow the rope to slide through his hands and either the section of the tree being lowered fell on him or he was pulled into the tree.

While the court in *Justus*, supra, recognized that the defendant was aware of the dangers to neighbors presented by the shed, or if a small child should wander onto their property, the defendants had no knowledge of the tree removal procedures employed or of the "peculiar risks" to the Plaintiff.

The *Justus* court held that, "it was not reasonable, nor in the public interest to expect a mere homeowner to be cognizant of, or liable for the 'special dangers' or 'peculiar risks' to employees of an independent contractor where he has no knowledge of the normal procedures involved in the activity, he has no knowledge of or capability to provide proper safety precautions, and where the independent contractor or his employees are more knowledgeable than the homeowner about the activity, risk, and necessary safety precautions."

The Appellee submits that the rationale in *Justus*, supra, does not apply to the present situation. The Nielsens were involved in a commercial logging and cherry growing operation, and had previously employed Anderson for logging and cherry harvesting jobs in the past, as well as conducting two prior timber cutting operations on his property. Therefore the Nielsens should not be considered the same as a mere homeowner with no knowledge of the normal procedures involved in the tree removal, but as an individual who had been previously involved in these activities in the

past. Further, as the evidence indicates, this was a “normal wood cutting operation” involving the felling and delimbing of trees, rather than the unique tree removal procedure such as that employed in *Justus*, supra. The Appellee submits that the risk or danger normal or inherent in the work performed by the Appellee and Anderson in this case is being struck by falling trees, which is readily recognizable by any reasonable person. Unlike the situation in *Justus*, supra, it does not require any special knowledge or expertise, such as when to release the rope; to perceive the danger here, all that is required is common sense. A recognizable risk is one which can be reasonably anticipated. *Bozak v. Hutchinson*, supra, p. 728. For this reason alone, the facts in the present case are distinguishable from those in *Justus*, supra.

The Appellee further submits that the underlying policy rationale in *Justus* is not present in this case as well. In *Justus*, the Court of Appeals created a homeowner exclusion to the inherently dangerous activity doctrine on the grounds that it was not reasonable or in the public interest to expect a mere homeowner to be liable for or cognizant of the “special dangers” or “peculiar risks” to the employees of an independent contractor involved in activities such as tree removal, furnace maintenance, carpentry, or like services performed at his home.

In *Justus*, the court dealt with an independent contractor performing a personal service contract for a homeowner. The homeowner in such a situation is dependent upon the contractor to provide a service necessary for the upkeep and maintenance of his home. The homeowner has no expectation of pecuniary or financial gain from the activity of the independent contractor. The homeowner's only expectation is to receive a service from the contractor and pay the contractor for the same. The court in *Justus* held that to impose liability in such a case would be to create an unreasonable risk to homeowners who are dependent upon the independent contractor for the upkeep and maintenance of their home, particularly where the contractor is in a better position to

assume these risks at a cost of doing business.

However, these considerations are not present in the situation where the landowner and independent contractor expect to receive financial gain from the activity. This situation is more akin to a joint business venture in which the parties expect to share both the risks and profits of the enterprise. The contracting parties in this situation are also able to defer the potential liability through insurance and worker's compensation, which are considered normal costs of doing business. To insulate a landowner engaged in activity as dangerous as logging from liability would only encourage the hiring of the lowest bidder for the job, who will almost invariably be the least competent and financially responsible. The ultimate result of such a policy will be more injured workers without any expectation of compensation or other recourse. Therefore, the situation in this case is in no way similar to that found in Justus v. Swope, supra.

The situation in the present case is similar to that found in Lyon v. Burnett, No. 153442, September 22, 1994 (unpublished). (Appellee's Appendix B). In Lyon, the plaintiff, an employee of an independent contractor was injured during a timber cutting operation on the plaintiff's property. The plaintiff brought an action against the defendant under the inherently dangerous activity doctrine. The Circuit Court granted the defendant's motion for summary disposition on the basis of Justus v. Swope, supra. The Court of Appeals reversed, holding that Justus, involved the removal of a single tree from the defendant's yard, while the present case involved an "extensive for profit timber operation." In Lyon, the court noted that the defendant had hired a professional forestry consultant regarding the removal of storm damaged trees, designation of the timber to be cut, location of a timber buyer, drafting of a timber sale contract, and overseeing the timber harvest.

As in Lyon, supra, the present case involves the cutting of timber for compensation, albeit on

a smaller scale. Also, as in *Lyon*, the Defendant in this case previously hired a forester to conduct a timber cutting operation on his property. Further, the Defendant recognized that logging was a risky business, unlike the situation in *Justus v. Swope*, supra, where the homeowner was familiar with the method of removing a single tree in sections through the use of ropes and pulleys, and thus unaware of the “peculiar risks” and “special dangers” that particular procedure presented to the plaintiff.

Despite the evidence presented by the Plaintiff, the Circuit Court concluded that there was no issue of material fact as to the Defendants’ knowledge of the inherent risk and danger involved in timber cutting in the present case. However, the Court of Appeal’s correctly concluded that these facts were distinguishable from those in *Justus v. Swope*, supra, relied on by the Circuit Court stating:

“The trial court held that defendant could not have reasonably anticipated the risks inherent in logging on the basis of *Justus v. Swope*, 184 Mich App 91; NW2d 103 (1990). In *Justus*, we declined to apply the inherently dangerous activity doctrine to impose liability on a homeowner who had hired a tree removal service to cut down a single tree near a building because a “mere homeowner” could not have anticipated the risks involved in this procedure. *Id.* At 96-98.

However, the instant case is distinguishable. Defendants had previously hired logging companies to conduct for-profit tree removals on twenty-acre parcels of land, and defendant Norman Nielsen, who entered into the logging contract, agreed that logging was risky. Viewing these facts in a light most favorable to the plaintiffs, a material question of fact existed with respect to defendants’ knowledge of the risks of logging at the time the agreement was made. Therefore summary disposition was improperly granted. *Maiden, supra* at 120.”

The Appellee submits that sufficient evidence was presented to establish a material issue of fact as to the dangerous nature of the work and the Defendant’s knowledge of the dangers inherent in timber cutting. Accordingly the Court of Appeals decision reversing the trial court’s grant of the Appellees motion for summary disposition should be affirmed.

IV

THE CIRCUIT COURT IMPROPERLY HELD THAT THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE CAN ONLY BE APPLIED TO UNUSUAL ACTIVITIES AND HAS NO APPLICATION WHERE THE PLAINTIFF'S INJURY COULD HAVE BEEN AVOIDED BY WELL RECOGNIZED SAFETY MEASURES.

The Appellant also asserts that the inherently dangerous activity doctrine is only applicable to unusual activity, and is not applicable cases involving routine activities or where injury could be avoided by providing reasonable safety measures.

While the Circuit Court recognized Lyon v. Burnett, supra, and other published cases holding that where evidence is presented showing the dangerous nature of a job, the determination of whether the activity is inherently dangerous is for the jury. Kubisz v. Cadillac Cage Textron, 236 Mich App 629; 601 NW2d 160 (1999); Burger v. Midland Cogeneration Venture, supra. It was the Circuit Court's conclusion that these cases were wrongly decided, and for that reason logging was not an unusual activity and that "reasonable safeguards could have been provided by well recognized safety measures" employed by a responsible contractor.

In support of this interpretation, the trial court relied on the Court of Appeals decision in Rasmussen v. Louisville Ladder, 211 Mich App 541; 536 NW2d 221 (1995) In Rasmussen, supra, court stated:

"The activity recognized by defendant Lake Shore to be performed by plaintiffs involved the fairly routine task of constructing a multistory building using hanging scaffolding. Reasonable safeguards against injury were expected to be used. *Id.* Further, there is no record evidence that Lake Shore knew that Ness Contracting would substitute hemp rope for steel safety cables."

A close reading of Rasmussen, supra, indicates that the court in that case applied what is known as the collateral source rule, which holds that an employer of an independent contractor is not liable if the independent contractor's activity creates a new risk not contemplated at the time of the contract.

Bozak v. Hutchinson, supra. The Circuit Court conclusion that the inherently dangerous activity doctrine requires a showing that the activity must be “unusual” and that the existence of “reasonable safeguards” against injury preclude liability was derived from dicta found in Funk v. General Motors Corp., 392 Mich 91; 220 NW2d 641 (1974) supra, stating:

“Similarly, liability should not be imposed where the activity involved was not unusual, the risk was not unique, ‘reasonable safeguards against injury could readily have been provided by well recognized safety measures,’ and the employer selected a responsible, experienced contractor.”

The Appellee submits that the reliance on the above language from Funk, is misplaced. In Funk, a workman of a subcontractor was injured when he fell through a hole in the roof he had created by removing the roof slabs. The trial court instructed the jury on theories of “inherently dangerous activity” and “retained control.” The jury returned a general verdict for the plaintiff against both General Motors and the general contractor. The Court of Appeals then granted General Motors a judgment notwithstanding the verdict on the grounds that the inherently dangerous activity doctrine did not apply where the plaintiff created the dangerous condition which was the immediate cause of his injury. Funk v. General Motors Corp., 37 Mich App 482; 194 NW2d 916 (1972). Subsequently, the plaintiff’s application for leave to appeal to the Supreme Court was granted. The Supreme Court reversed the Court of Appeals decision as to General Motors and affirmed as to the general contractor. In reversing the Court of Appeals decision with respect to General Motors, the Supreme Court agreed that the inherently dangerous activity doctrine did not apply, but held the evidence could have supported a verdict against General Motors under the theory of retained control and therefore remanded the case for a new trial on the grounds of instructional error.

The language in Funk, supra, cited in Rasmussen and relied upon by the Appellant in the present case to support the proposition that liability should not be imposed where the activity was

not unusual, and “that reasonable safeguards against injury could readily have been provided by well recognized safety measures” was explained in footnote 14 of the opinion as relating to the question of whether owners generally are relieved of tort responsibility for tasks delegated to a carefully selected contractor. Funk v. General Motors Corp., supra, p. 110. As the Court of Appeals noted in the instant case “ although cases have discussed whether an inherently dangerous activity must be “unusual” to support the imposition of liability, in none of those cases was that factor dispositive. See Szymanski v. K Mart Corp., 196 Mich App 427; 493 NW2d 460 (1992). Rasmussen v. Louisville Ladder, supra (risk of injury arose from the failure to use well-recognized safety measures).

The confusion found in Rasmussen and other cases with respect to the language in Funk with regard to providing “reasonable safeguards” and well recognized safety measures appears also to be in part derived from a misinterpretation of Section 426 Restatement of torts 2d which state

“Except as stated in Sec. 428 and 429, an employer of an independent contractor, unless he is himself negligent, is not liable for physical harm caused by any negligence of the contractor if

- a) the contractor ‘s negligence consists solely in the improper manner in which he does the work, and
- b) it creates a risk of such harm which is not inherent in or normal to the work, and
- c) the employer had no reason to contemplate the contractor’s negligence when the contract was made” 2

Restatement Torts, 2d, Sec. 426, p 413.

Reliance upon subsection (a) above has apparently resulted in some courts to hold that the contractor’s performing the work in a improper manner absolves the employer of the contractor form liability. Thus if there is a recognized safety measure that could have been employed there is no liability. However , as noted in Bozak, supra, Section 426 is property understood as a guide to determine whether the injury was the result of some collateral risk not reasonably contemplated at the time of the contract which is not inherent in the normal manner in which the work is performed.

However, where the risk is one which can reasonably be contemplated at the time of the contract and is one which is normal or inherent to performing the work in the prescribed manner, the focus is then appropriately on whether or not the proper safety measures were utilized, or in other words was great care exercised. McDonough v. General Motors Corp., supra.

Accordingly, there is no authority for the Appellant's assertion that there is no liability unless the activity is "unusual" or where injury could have been avoided by employing well recognized safety measures. In fact, if this were the case, it would create an absurd paradoxical rule that imposes liability only in situations where the contractor follows established safety procedures, but no liability in those cases where established safety measures are not followed. Such a result would be contrary to the policy behind the law of torts, which is to encourage implementation of reasonable safeguards in addition to the compensation of victims. Funk v. General Motors Corp., supra.

According to comments (b), (c) and (d) of Section 427, Restatement of Torts and the inherently dangerous activity doctrine is applicable to the following situations:

- b. It is sufficient that work of any kind involves a risk, recognizable in advance, of physical harm to others which is inherent in the work itself, or normally to be expected in the ordinary course of the usual or prescribed way of doing it, or that the employer has special reason to contemplate such a risk under which the work is done.
- c. The rule applies equally to work, which, although not highly dangerous, involves a risk recognizable in advance that danger inherent in the work itself, or in the ordinary or prescribed way of doing it, may cause harm.
- d. As in the case of the rule stated in Sec. 416, the rule here stated applies only where the harm results from the negligence of the contractor in failing to take precautions against the danger involved in the work itself, which the employer should contemplate at the time of his contract. It has no application where the negligence of the contractor creates a new risk, not

inherent in the work itself or in the ordinary or prescribed way of doing it, and not reasonably to be contemplated by the employer.”

The Appellee submits that the danger inherent in the prescribed or ordinary and usual of performing the work in the present case is being struck by falling trees. This is precisely how he was injured. Further, as noted in comment (d), above, the evidence here strongly suggests that the contractor failed to take adequate safety precautions against dangers inherent to the work itself.

A review of those cases which hold that the inherently dangerous activity doctrine is applicable were in cases where the plaintiff was injured in manner that was foreseeable from performing the work in the usual or ordinary manner. *Burger*, supra. (Plaintiff was injured when he fell from pipe). *Vannoy v. City of Warren*, supra. (Plaintiff working in sewer was asphyxiated by methane gas). *Oberle v. Hawthorne Metal Products Co.*, 192 Mich App 265; 480 NW 2d 330 (1991) (Plaintiff was injured when he fell into an unguarded pit). *Kubisz v. Cadillac Cage Textron, Inc.*, supra. (Plaintiff welding a fuel tank was injured when tank exploded).

Similarly, the doctrine has not been applied where the plaintiff was engaged in a collateral activity or where the risk was not contemplated at the time of the contract. *Bozak v. Hutchinson*, supra. *Funk v. General Motors Corp.*, supra. (Plaintiff created the risk by removing slabs from roof). *Butler v. Ramco-Gershenson, Inc.*, 214 Mich App 521; 542 NW2d 912 (1995). (Parties contemplated risk of falling bricks, but did not contemplate coping would fall).

Therefore, the Circuit Court erred by holding that the inherently dangerous activity doctrine required a showing that the activity was somehow unusual or that the injury could have been avoided by providing reasonable safeguards. On the contrary, the inherently dangerous activity doctrine is generally applicable where the danger is inherent in performing the work in the usual or prescribed manner unless great care is exercised. *McDonough v. General Motors Corp.*, supra.

V.

ANY DECISION THAT THE INHERENTLY DANGEROUS ACTIVITY NO LONGER APPLIES TO EMPLOYEES OF INDEPENDENT CONTRACTORS SHOULD BE GIVEN ONLY PROSPECTIVE EFFECT.

If this court were to hold that the inherently dangerous activity doctrine no longer applies to employees of independent contractors a question arises as to whether it should be given retroactive or prospective effect. The general rule is that judicial decisions are given full retroactive effect *Hyde v. University of Michigan Board of Regents*, 426 Mich 223; 393 NW2d 847 (1986). However, a holding that over rules settled precedent may properly be limited to prospective application, *Pohutski v. City of Allen Park*, supra. Similarly, a flexible approach may be employed where injustice might result from full retroactivity, *Lindsay v. Harper Hospital*, 455 Mich 56, 564 NW2d 861 (1997).

In *Pohutski v. City of Allen Park*, supra, this court set forth a three part test to determine if a decision should not be given retroactive application; these factors are: 1) the purpose to be served by the new rule 2) the extent of reliance on the old rule and 3) the effect of retroactivity on the administration of justice.

In addition to these factors there is an additional threshold question as to whether the decision clearly established a new principal of law, *Riley v. Northland Geriatric Center*, (after remand) 431 Mich 632; 433 NW 2d 787 (1988).

In *Pohutski v. City of Allen Park*, supra, this court overruled its prior decision in *Hadfield v. Oakland County Drain Commission*, 430 Mich 139; 422 NW 2d 205 (1988), allowing a tress pass- nuisance exception to the governmental tort liability act MCL 691.1407; but gave it only prospective application to those cases arising after its decision. The *Pohutski* court noted that the purpose of the new rule was to correct an error in the interpretation of the governmental tort liability act. However,

its decision was “akin to the announcement of a new rule of law,” given the erroneous interpretation of the statute in its prior decision. The court also found that there had been extensive reliance on the prior decision by the courts, municipalities, insurers and homeowners. Also the recently enacted 2001 PA 222’s amendment of the governmental tort liability act abrogating common law exceptions to immunity and providing an exclusive no fault remedy for damages or physical injury resulting from a sewage event had only prospective application; therefore retroactive application would create a class of Plaintiffs in cases currently pending who could not be afforded relief.

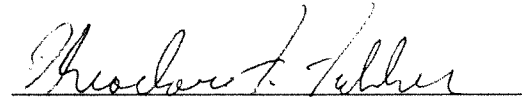
Plaintiff-Appellee submits that similar considerations are present in this case. As previously noted the application of the inherently dangerous activity doctrine has been applied to the employees of independent contractors for over 30 years. There have been no contrary decisions from this court or the Court of Appeals on this issue. To hold that the inherently dangerous activity doctrine no longer applies to the employees of independent contractors would announce a new rule of law that alters the legal landscape of the state.

Similarly, courts, employers, contractors, employees and insurers have all relied on the prior decisions for the past thirty some years, in making contracting and employment decisions. While future employees can make an informed decision to work for a contractor engaging in inherently dangerous work based on the availability of the contractors worker’s compensation and liability insurance, while workers injured in accidents prior to the date of decision would lose all possibility of any recovery if a decision denying recovery under the inherently dangerous activity doctrine were given retroactive effect. Accordingly, the Appellee submits that any decision reversing prior precedents that the inherently dangerous activity doctrine applies to the employees of independent contractors should be given only prospective application to avoid injustice resulting from reliance on prior case law

CONCLUSION AND RELIEF REQUESTED

Accordingly, on the basis of arguments and authorities cited herein and those cited in the brief of the intervenors, the Plaintiff respectfully requests that the decision of the Court of Appeals reversing the trial courts granting of Defendant's Nielsens' motion for summary disposition be affirmed and this matter be remanded to the Circuit Court for trial. Alternatively, that if the court determines that the inherently dangerous activity doctrine does not apply to employees of independent contractors that this holding be limited to those employees covered by worker' compensation. Further, that any decision overruling prior precedents with respect to application of the inherently dangerous activity doctrine to employees of independent contractors be given only prospective application.

Respectfully submitted,



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